RECORD
AND
BRIEFS

No. 132, ORIGINAL

Supreme Court, U.S.
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In the
Supreme Court of the United States

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STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

*Plaintiffs,*

v.

STATE OF NORTH CAROLINA,

*Defendant.*

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**On Motion for Leave to File Bill of Complaint**

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# BRIEF IN OPPOSITION

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ROY COOPER
North Carolina Attorney General

Grayson G. Kelley*, Senior Deputy Attorney General
John F. Maddrey, Special Deputy Attorney General
Jennie Wilhelm Mau, Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900

August 5, 2002

*Counsel of Record

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I

## THE MOTION FOR LEAVE TO FILE BILL OF COMPLAINT SHOULD BE DENIED

Plaintiffs' Motion seeks leave to file essentially the same Bill of Complaint that was denied by this Court on June 25, 2001 (Docket No. 131, Original). The relief sought is identical to that set forth in the previous action. The only substantive change in the Bill of Complaint is the repackaging of the action by the addition of four new named plaintiffs – the State of Alabama, the State of Florida, the State of Tennessee, and the Commonwealth of Virginia – to the original plaintiff, the Southeast Interstate Low-Level Radioactive Waste Management Commission (the "Commission"). The plaintiffs' own pleadings, however, demonstrate that the four states have been added as nominal parties for the sole purpose of invoking the original jurisdiction of this Court to resolve a dispute between the Commission and the State of North Carolina.

In renewing its Motion for leave to file the Bill of Complaint, the Commission relies heavily upon a view expressed in the Brief for the United States as *Amicus Curiae* filed in the prior action suggesting that this Court would have exclusive original jurisdiction over an action brought by one or more of the States that are parties to the Southeast Interstate Low-Level Radioactive Waste Management Compact (the "Compact") against another party State to enforce the Compact. Ironically, whereas the Commission went to great lengths to discredit and belittle the legal analysis and conclusions set forth in that brief (*See* Supplemental Brief in Response to the Brief of the Solicitor General, No. 131, Original, filed June 5, 2001),

the Commission's renewed Motion is explicitly premised upon Plaintiffs' acceptance of "the implicit invitation of the United States to file an original action against North Carolina pursuant to 28 U.S.C. §1251(a)." (Motion for Leave to File Bill of Complaint and Bill of Complaint (hereinafter "Motion") at 19)

Aside from the Commission's unusual assertion that it has received an "invitation" from the United States to refile an original action in this Court, its reliance on the Brief for the United States ignores the Solicitor General's expressed limiting condition that original jurisdiction may only be invoked by a party state "on the basis of a proper cause of action" in which a state "seek[s] an appropriate remedy." (Petitioners' Appendix (hereinafter "Pet. App.") at 14a, 21a) Nowhere does the Solicitor General suggest that the Commission's addition of four states as nominal plaintiffs converts the prior action into a proper cause of action appropriate for the exercise of this Court's original jurisdiction.

The factual predicate for the Commission's Motion has not changed. The Commission is the real party in interest, seeking monetary damages from the State of North Carolina in the same amount and under the same legal theories argued in its prior Motion. The Commission specifically asserted in the prior action that "only the Commission itself can sue to enforce the sanction against North Carolina, and collect the $90 million (plus interest) that is owed to it." (Supplemental Brief in Response to the Brief of the Solicitor General, No. 131, Original, at 6) The addition of four states as nominal plaintiffs does nothing to modify this posture, and should not be accepted

as a basis for reconsideration of the Court's prior rejection of the Commission's Motion.

## STATEMENT OF THE CASE

Compact (enacted by North Carolina at N.C. GEN. STAT. § 104F-1 (repealed effective July 22, 1999) (App. at 5a-26a)), was enacted by each of the eight original member states and consented to by the United States Congress in the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act[1] Pub. L. No. 99-240, Title II, 99 Stat. 1859 (1986). North Carolina joined the Compact as a party state pursuant to legislation enacted by the 1983 North Carolina General Assembly. It was the intent of the party states, as stated in the Compact agreement, to:

> enter into a regional low-level radioactive waste management compact for the purpose of providing the instrument and framework for a cooperative effort, provide sufficient facilities for the proper management of low-level radioactive waste generated in the region, promote the health and safety of the region, limit the number of facilities required to effectively and efficiently manage low-level radioactive waste generated in the region, encourage the reduction of the amounts of low-level waste

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[1] The original party states were Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. South Carolina withdrew from the compact in 1995. North Carolina withdrew in 1999.

> generated in the region, distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states, and ensure the ecological management of low-level radioactive wastes.

Compact, Article I (App. at 6a).

The Compact agreement also created Commission to carry out the general administrative functions of the Compact. Compact, Article IV (App. at 11a-18a). Each party state was allowed to appoint two voting members to the Commission. The costs of the Commission's operations were to be funded by an initial $25,000 payment made by each party state and through surcharges to be levied on generators disposing waste at the regional facility. The first designated regional facility was the waste facility already operating in Barnwell County, South Carolina. Compact, Article IV(h) (App. at 15a-16a); Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, Pub. L. No. 101-171, § 2, art. 7(H), 103 Stat. 1289 (1989).

Under the express terms of the Compact, it was agreed that each party state retained all elements of its sovereignty and that nothing in the Compact would be construed to "infringe upon, limit or abridge those rights." Compact, Article III (App. at 9a). The party states further agreed that nothing in the Compact would serve to "[a]lter the relations between, and the respective internal responsibilities of, the government of a party state and its subdivisions" or "[a]ffect the rights and powers of

any party state and its political subdivisions to regulate and license any facility within its borders." Compact, Article VI(a)(7) and (9) (App. at 20a). Moreover, each party state, including North Carolina, reserved an unconditional right to withdraw from the Compact at any time up until thirty days after commencement of operation of the second host state disposal facility. Compact, Article VII(h) (App. at 24a); Southeast Interstate Low-Level Radioactive Waste Compact Amendments Consent Act of 1989, Pub. L. No. 101-171, 103 Stat. 1289 (1989).

The Commission selected North Carolina as the second host state in September, 1986. In response to the selection, the North Carolina General Assembly enacted legislation creating the Low-Level Radioactive Waste Management Authority (the "Authority") for the purpose of fulfilling its responsibilities under federal law and the Compact, while protecting public health, safety and the environment. N.C. GEN. STAT. § 104G (repealed effective July 1, 2000). The Authority initiated the complex, expensive and lengthy process of engaging consultants and contractors necessary to move forward with site selection, licensing and construction of a disposal facility.

In December, 1993, the Authority's primary contractor, Chem-Nuclear Systems, Inc. ("Chem-Nuclear"), submitted a license application for a site in Wake County, North Carolina to the State's licensing authority, the Division of Radiation Protection in the Department of Environment, Health, and Natural Resources (the "Department"). The Department is the designated state agency responsible for administration of

North Carolina's radiation protection program, with specific responsibility for the process of licensing low-level radioactive waste facilities. N.C. GEN. STAT. § 104E (1999). After extensive review by the Department, significant deficiencies were found in Chem-Nuclear's original application. Additionally, numerous technical concerns related to health and safety were revealed which required resolution prior to licensing the proposed Wake County site.

The issue of funding responsibility for host state disposal facilities is not specifically addressed by the Compact. Although Article IV(h) of the Compact provides for funding of the Commission's operations, there are no direct references to financial responsibility for the initial costs necessary for site identification, licensing and construction of a regional facility. Article I, however, does declare it to be Compact policy to "distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states."

In February, 1988 the Commission, in recognition of this policy, agreed that it would be "appropriate and necessary" to provide funding for "any state" developing the second disposal facility and thus authorized the use of the Commission's "State Assistance Trust Fund" "for the initial planning and administrative costs and other pre-operational costs associated with [North Carolina's] obligation to create and operate a regional facility." *See* Feb. 9, 1988 Resolution (Pet. App. at 34a). The monies in the "State Assistance Trust Fund" were part of the Commission's operating budget financed through

surcharges paid by generators utilizing the Barnwell disposal site.

In 1989, the Commission unanimously voted to levy an additional "Capacity Assurance Charge" on generators disposing waste at Barnwell. Under this system, payments made by generators were collected by Chem-Nuclear, which also operated the Barnwell facility, and forwarded to the Commission "[t]o assure the timely development of the second regional disposal facility in North Carolina." *See* Oct. 24, 1989 Minutes, Southeast Compact Commission (Pet. App. at 36a-47a, 39a). The Commission's policy of collecting surcharges and fees from generators to fund the development of the second disposal facility continued until South Carolina withdrew from the Compact in 1995. *See* Nov. 15, 1990 Minutes, Southeast Compact Commission (Pet. App. at 48a-59a); Sept. 28, 1992 Minutes, Southeast Compact Commission (Pet. App. at 60a-65a); Nov. 13, 1992 Minutes, Southeast Compact Commission (Pet. App. at 66a-67a).

North Carolina relied on the Commission's assurance of supplemental funding in moving forward with the site selection and licensing process. The State, however, in a good faith effort to fulfill its responsibilities under federal law and the Compact, also contributed substantial state funds and resources in furtherance of the project, in excess of $50 million. Generator fees were the source of all Commission funds provided to North Carolina for use in the facility licensing process, the other party states having made no financial

contribution to the Compact beyond their initial $25,000 payment.

In July, 1995, South Carolina withdrew from the Compact and closed Barnwell as a regional facility, purportedly due to North Carolina's inability to develop a second disposal facility within the original projected schedule. This withdrawal and immediate closure was a clear violation of the terms of the Compact agreement requiring that the Barnwell facility remain open for four years after notification of withdrawal. Compact, Article VII(g) (App. at 24a). The Commission, however, took no action (either in the form of sanctions or a legal proceeding) against South Carolina. Nor did the Commission act to ensure that the Barnwell disposal facility would remain available to all of the region's generators for the required four years. South Carolina subsequently re-opened the Barnwell facility to generators from all states other than North Carolina.[2]

As a result of South Carolina's withdrawal from the Compact, the Commission lost the Barnwell disposal facility as a source of funding. Rather than initiating action against South Carolina, however, the Commission's reaction was to terminate funding to North Carolina. On January 5, 1996, the Commission Chairman notified North Carolina that future funds would not be available for development of the second

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[2] Effective July 1, 2000, South Carolina joined the Atlantic Interstate Low-Level Radioactive Waste Compact and repealed the ban on low-level radioactive waste shipments to the Barnwell disposal facility from generators located in North Carolina.

regional disposal facility. *See* Jan. 5, 1996 Letter from Richard S. Hodes to Governor James B. Hunt (Pet. App. at 70a-74a).

In response, Governor Hunt advised the Commission that the Compact agreement contemplated an equitable distribution of costs and reminded Dr. Hodes that North Carolina had at that time already contributed $30 million of state funds for the facility, while none of the other party states had directly provided any money beyond their original $25,000 contribution. Governor Hunt advised the Chairman that under such circumstances he would not recommend that the General Assembly "assume a greater portion [of] the financial responsibility for the project than it [had] done to date." *See* Apr. 8, 1996 Letter from Governor James B. Hunt to Richard S. Hodes (App. at 27a-30a, 30a) and Jun. 14, 1996 Letter from Governor James B. Hunt to Richard S. Hodes (Pet. App. at 80a-81a).

Despite the Commission's notification that funding would be terminated, sporadic funds were released, thereby allowing North Carolina to continue its progression toward a licensing decision. *See* Oct. 3, 1996 Minutes, Southeast Compact Commission (Pet. App. at 88a-94a); Apr. 18, 1997 Minutes, Southeast Compact Commission (Pet. App. at 95a-99a); Aug. 21, 1997 Minutes, Southeast Compact Commission (Pet. App. at 103a-105a). In December, 1997, however, the Commission did terminate all supplemental funding of the project, thereby shifting the total economic burden for the facility to the taxpayers of North Carolina. *See* Dec. 1, 1997 Letter from Richard S. Hodes to Low-Level Radioactive Waste

Management Authority Chairman Warren G. Corgan (App. at 31a-32a). In response to the Commission's decision, North Carolina had no option but to discontinue site development activities. *See* Dec. 19, 1997 Letter from Warren G. Corgan to Richard S. Hodes (Pet. App. at 117a-120a).

In June, 1999 two party states, Tennessee and Florida, filed a complaint with the Commission under Article VII(f) of the Compact, seeking sanctions against North Carolina for cessation of facility development activities. Article VII(f) subjects any "party state" to potential sanctions for violation of the Compact terms.

On July 26, 1999 the North Carolina General Assembly enacted legislation repealing the Compact law and withdrawing North Carolina from the Compact. 1999 N.C. Sess. Laws 357 (App. at 1a-3a). This action was in accordance with the right of withdrawal reserved by each state pursuant to Article VII(g) of the Compact. The Commission was advised of North Carolina's withdrawal on the date the legislation was enacted.

On August 18, 1999, the Commission voted to initiate a formal sanctions hearing procedure against North Carolina. In November, 1999 the Commission notified North Carolina that a sanctions hearing would be held on December 8, 1999, with a decision regarding sanctions to be made on December 9, 1999. *See* Nov. 8, 1999 Letter from Kathryn V. Haynes, Executive Director, Southeast Compact Commission, to Governor James B. Hunt, Jr. (Pet. App. at 135a-36a). In response to this notification, the North Carolina Attorney

General sent a letter to the Chairman of the Commission advising him that the Commission had no jurisdiction over North Carolina subsequent to the State's withdrawal from the Compact. *See* Dec. 1, 1999 Letter from Attorney General Michael F. Easley to Richard S. Hodes (Pet. App. at 132a-34a).

Disregarding North Carolina's withdrawal from the Compact, the Commission held a hearing on December 8, 1999, and on December 9, 1999 voted to impose sanctions. *See* Compact Resolution adopted Dec. 9, 1999 (Pet. App. at 137a-38a). The Commission's resolution demanded repayment of $79,930,337 in generator surcharges, plus interest, payment of $10 million for lost future generator surcharges, and attorneys' fees. In a press release issued December 9, 1999 the North Carolina Attorney General gave notice to the Commission that North Carolina, having lawfully withdrawn from the Compact, would not recognize the Commission's attempt to impose sanctions. *See* Dec. 9, 1999 Press Release by Attorney General Michael F. Easley (Pet. App. at 139a-40a).

On July 10, 2000 the Commission filed its first Motion for Leave to File Bill of Complaint and Bill of Complaint (No. 131, Original), which was denied by this Court on June 25, 2001. The Commission, along with four of the states that are parties to the Compact, filed a second Motion for Leave to File Bill of Complaint and Bill of Complaint on June 3, 2002.

## ARGUMENT

### I. THE COMMISSION CANNOT INVOKE THE ORIGINAL JURISDICTION OF THIS COURT BY ADDING FOUR STATES AS NOMINAL PLAINTIFFS.

The constitutional premise that a sovereign state has standing to invoke the original jurisdiction of this Court to hear a suit against another state does not extend to actions in which the plaintiff-state is only a nominal party. This Court has recently reiterated the principle that a "State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens." *Kansas v. Colorado*, 533 U.S. 1, 8, (2001) (citing *Maryland v. Louisiana*, 451 U.S. at 737). A state cannot invoke original jurisdiction for the benefit of particular individuals, even if the state asserts an economic interest in the claim. *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 394 (1938). In order to properly utilize this Court's original jurisdiction, "the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." *Id.* at 396. Where it is apparent that the name of the state is being used simply for the prosecution of a claim of another entity, the original jurisdiction of this Court cannot be maintained. *Kansas v. United States*, 204 U.S. 331, 341 (1907).

A review of the factual basis for the Motion and the proposed Bill of Complaint clearly demonstrates that the plaintiff states are not the real parties in interest concerning the

matters alleged. Plaintiffs seek a monetary award to be paid to the Commission in excess of $90 million from the State of North Carolina, yet none of the funds at issue were ever public funds of the plaintiff states. Nor have the states incurred monetary damages, costs or attorneys' fees as alleged in the proposed Bill of Complaint. It is undisputed that the money plaintiffs seek to recover was "raised exclusively by levying fees and surcharges on wastes being disposed of at the first regional disposal facility in Barnwell, South Carolina." (Motion at 3). The funds collected and distributed by the Commission were received from nuclear waste generators and were never attributable to the treasuries of the party states to the Compact.

Under the explicit terms of the Compact the states are not responsible for its financial obligations. The Commission is a legal entity separate and distinct from the party states, capable of acting on its own behalf, liable for its own actions, and vested with specific statutory rights and obligations. Compact, Article IV (App. at 11a-18a). As noted by the Solicitor General in the brief filed in the prior action:

> The Commission is not suing North Carolina to recoup funds that are owed to the other party States. Indeed, the Commission–and not the States that are parties to the Compact–dispersed the funds to North Carolina in the first place.

Brief for the United States as *Amicus Curiae* (Pet. App. at 20a). The plaintiff states have not and cannot assert a direct claim for

restitution, reimbursement of funds, monetary damages, costs or attorneys' fees because the money in question never belonged to the states. Moreover, as demonstrated by the Commission's own pleadings, any funds ultimately recovered from North Carolina will become the property of the Commission and will not become public funds of the four states which have been added as plaintiffs in this action.

The fact that the states have been added to the Complaint as merely nominal parties is further demonstrated by the continued presence of the Commission as a named plaintiff and the nature of the relief sought. While the action is styled in terms of enforcing the provisions of the Compact, the relief sought is actually nothing more than a demand that North Carolina be ordered to pay the Commission a monetary award because of an asserted breach of contract. The proposed Bill of Complaint requests neither injunctive relief nor mandatory orders seeking protection of the public health or safety. Furthermore, all of the requested monetary relief would go directly to the Commission treasury. Indeed, the Prayer for Relief in the proposed Bill of Complaint is substantively identical to that requested in the prior Bill of Complaint, an action in which the Commission was the only party, and specifically restricts the relief requested to ratification of actions taken by the Commission. Therefore, it is apparent from these facts that the plaintiff states are not seeking to invoke the original jurisdiction of this Court to vindicate their own interests, but those of the Commission.

The credibility of the Commission's attempt to invoke this Court's original jurisdiction by adding four party states as plaintiffs is further diminished by the notable absence of the remaining party states to the Compact, Mississippi and Georgia. Assuming *arguendo*, that the party states, and not the Commission, are the real parties in interest, the states of Mississippi and Georgia, which have apparently declined to contribute to this façade, are clearly necessary parties. The asserted cause of action implicates their rights and property to the same extent as the rights of the four named plaintiff states. The absence of Mississippi and Georgia as parties to this action therefore reinforces the Commission's own admission that "[t]here is no need to have the States involved in this litigation." (Supplemental Brief in Response to the Brief of the Solicitor General, No. 131, Original, at 5 n. 2)

The source of the funds, the inability of any party state to show a direct entitlement to a discrete portion of the funds disbursed to North Carolina, together with the nature of the relief sought in the proposed Bill of Complaint all point to the inevitable conclusion that the Commission is in fact the real party in interest in this matter and, as has already been determined, cannot invoke the original jurisdiction of this Court. As such, the Commission's transparent attempt to revive the Motion rejected by this Court on June 25, 2001, should be denied.

## II. THE NATURE OF THE CASE DOES NOT JUSTIFY THE EXERCISE OF ORIGINAL JURISDICTION.

This Court has consistently reiterated that its original jurisdiction should be invoked sparingly and only in appropriate cases. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). What is "appropriate" involves not only "the seriousness and dignity of the claim" but also the "availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Id.* at 93. As early as 1900 the Court said that its original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900).

The reasons for the Court's cautionary approach to its original jurisdiction were aptly described by Justice Harlan in *Ohio v. Wyandotte Chemical Corp.*, 401 U.S. 493 (1971):

> [A]lthough it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so, it seems evident to us that changes in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes that may arise between one State and a citizen or citizens of another,

> even though the dispute may be one over which this Court does have original jurisdiction.
>
> As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies.

*Id.* at 497.

In exercising this discretion, the Court has frequently observed that its primary role is that of the final appellate court in our judicial system, *id.* at 499, and that the expanding number of original jurisdiction cases may impair and interfere with the discharge of the Court's primary duties. *See Washington v. General Motors Corp.*, 406 U.S. 109 (1972); *Massachusetts v. Missouri*, 308 U.S. 1 (1939).

The Court has also emphasized the historical concerns of federalism which fostered the establishment of original jurisdiction. *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981). Substantial consideration is more likely to be given to cases that "implicate serious and important concerns of federalism."

*Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992). Chief Justice Rehnquist has, in fact, suggested that the Court restrict its acceptance of suits between states to those involving issues of state sovereignty:

> I would require that the State's claim involve some tangible relation to the State's sovereign interests. Our original jurisdiction should not be trivialized and open to run-of-the-mill claims simply because they are brought by a State, but rather should be limited to complaints by States *qua* States. This would include the prototypical original action, boundary disputes, and the familiar cases involving disputes over water rights. In such cases, the State seeks to vindicate its rights as a State, a political entity.

*Maryland v. Louisiana*, 451 U.S. at 766 (Rehnquist, J. (now C.J.), dissenting).

Plaintiffs in this case move the Court for permission to file a Bill of Complaint against the State of North Carolina alleging causes of action that, in essence, constitute little more than a contract dispute seeking compensatory damages. The proposed Bill of Complaint alleges breach of contract, unjust enrichment, promissory estoppel, "money had and received," and "violation of member states' rights under the Compact." (Motion at 11-14) Resolution of these allegations centers around the issue of whether North Carolina breached the Compact agreement. The relief requested in this second Motion is a straightforward

demand that North Carolina be ordered to pay the Commission monetary damages.[3]

Plaintiffs' suit raises no issues related to the core sovereign interests of the states of North Carolina, Alabama, Florida, Tennessee, or Virginia. Neither the nature of the case, the magnitude of the claim nor the rights asserted against North Carolina are of sufficient scope or breadth to implicate issues of federalism and sovereign state interests requiring initial resolution by this Court.

Plaintiffs further suggest that the Supreme Court should accept this case because North Carolina's actions "have exposed the states to potentially serious threats to the public health and safety of their citizens." (Motion at 26) This suggestion is neither legally nor factually supportable. Although it is clear that a state has a right as *parens patriae* to "bring suit to protect the general comfort, health or property rights of its inhabitants threatened by the proposed or continued action of another State." *North Dakota v. Minnesota*, 263 U.S. 365, 376 (1923), it is equally clear that "[b]efore this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious

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[3] The resolution passed by the Commission on December 9, 1999, resolved that North Carolina should repay to the Commission the sum of $79,930,337, plus interest at the applicable legal rate from January 1, 1998; the sum of $10 million resulting from the loss of a source of Commission funds for a twenty-year period, and the Commission's attorneys' fees from June 21, 1999. (Pet. App. at 137a-38a.)

magnitude and it must be established by clear and convincing evidence." *New York v. New Jersey*, 256 U.S. 296, 309 (1921).

Plaintiffs' Bill of Complaint requests neither injunctive relief nor mandatory orders seeking protection of the public health or safety. The relief sought is purely monetary compensation to be returned to the Commission treasury, which is unlikely to be utilized for many years, if ever, for purposes related to public health or safety.

Nor do Plaintiffs suggest any specific, much less clear and convincing, evidence that serious public health concerns are at stake in this case. In the sixteen years since enactment of the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, 99 Stat. 1859, not a single regional low-level radioactive waste disposal site has been constructed by any of the numerous regional compacts throughout the nation. Environmental, technological, safety and political concerns have impeded the progress of site licensing and development in each compact region. During that period, however, existing public and private disposal facilities, combined with regulated on-premise storage programs at generator facilities, have established a demonstrated capability to safely manage low-level radioactive waste in the absence of new regional compact sites. Public policy concerning low-level radioactive waste disposal is being re-evaluated on a national basis. In the interim the "serious public health concerns" asserted by Plaintiffs as a basis for original jurisdiction of this case simply do not exist. (Motion at 20)

## III. ALTERNATIVE FORUMS ARE AVAILABLE TO HEAR THE COMMISSION'S CASE.

This Court, in exercising its discretion to make case-by-case judgments as to the exercise of its original jurisdiction, has long considered the availability of an alternative forum to be a paramount factor. *Texas v. New Mexico*, 462 U.S. 554 (1983); *Illinois v. City of Milwaukee*, 406 U.S. 91. In *Arizona v. New Mexico*, 425 U.S. 794 (1976) (*per curiam*), the Court declined to exercise original jurisdiction over a suit brought by Arizona challenging a tax imposed by New Mexico on electricity generated within New Mexico prior to sale to Arizona consumers. In concluding that pending litigation in state court provided an appropriate alternative forum, the Court, quoting from the original jurisdiction standard recited by Justice Douglas in *Illinois v. City of Milwaukee*, 406 U.S. at 93-94, stated:

> We construe 28 U.S.C. § 1251 (a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.

*Arizona v. New Mexico*, 425 U.S. at 796-97.

In seeking leave to file the Bill of Complaint, the plaintiffs cite the Brief of the United States for the proposition that a suit by a member state to enforce the Compact falls within this Court's exclusive original jurisdiction. (Motion at 26) The Commission asserts that the Supreme Court "is the only forum in which the States are guaranteed to receive a fair and impartial ruling as to the proper interpretation and enforcement of the Compact that regulates the relevant relationships among them." (Motion at 27) Quoting from *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), the Commission argues that "[a] State cannot be its own ultimate judge in a controversy with a sister State." *Id.* at 28 (Motion at 27).

It is clear that the Court has not considered the *dicta* from *Sims* cited by the Commission as dispositive of the question whether state courts may be appropriate alternative forums for original jurisdiction cases. That case involved a dispute among West Virginia state officials concerning the constitutionality of a state statute, and did not directly address the issue of appropriate alternative forums for disputes between two states. Indeed, the language relied upon by plaintiffs came "in the context of this Court's *review* of the state court judgment on certiorari." Brief for the United States as *Amicus Curiae* (Pet. App. at 21a)

The Commission's argument for jurisdiction in this Court ignores the analysis set forth in the Brief of the United States explicitly repudiating any reliance upon *Sims* to support a claim

of a lack of an alternative forum. As stated by the Solicitor General in the brief filed in the prior action:

> Contrary to the Commission's contention, *Sims* demonstrates that state courts *are* appropriate fora for resolving interstate compact controversies that do not fall within this Court's exclusive original jurisdiction. This Court may review a state court's interpretation of a compact–which is a matter of federal law–through a writ of certiorari. . . . This Court can accordingly ensure that a state court's initial exercise of jurisdiction over a compact dispute involving a non-State party would not result in a single State being the "ultimate judge" of the federal issues raised in the bill of complaint.

Brief for the United States as *Amicus Curiae* (Pet. App. at 21a-22a) (citations omitted).

This Court has, in fact, frequently concluded that state courts are appropriate alternative forums. *Arizona v. New Mexico*, 425 U.S. 794; *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493; *Massachusetts v. Missouri*, 308 U.S. 1. Although plaintiffs cite *Ohio v. Wyandotte Chemicals Corp.*, in support of its contention that a state court could not adjudicate its claims in an impartial manner, this Court actually concluded that Ohio state courts were an appropriate alternative forum, stating:

> The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest.

401 U.S. at 500. Likewise, there is no merit in the plaintiffs' contention that this contract dispute cannot be fully and fairly heard in North Carolina state courts. Indeed, the Solicitor General characterized the Commission's argument claiming the lack of an adequate alternative forum as "unsound." Brief for the United States as *Amicus Curiae* (Pet. App. at 20a).

## IV. NORTH CAROLINA DID NOT BREACH ITS OBLIGATIONS UNDER THE COMPACT.

Plaintiffs request that this Court order North Carolina to show cause why the Commission's sanction decision should not be summarily affirmed and enforced. (Motion at 29) Aside from the jurisdictional issues discussed herein, sound substantive legal reasons support North Carolina's refusal to honor the Commission's resolution. Most significantly, the Compact does not authorize the Commission to impose sanctions on a state which has withdrawn from the Compact. The Compact agreement allows any state to withdraw from the Compact as follows:

> Subject to the provisions of Article VII section (h), any party state may withdraw from the compact by enacting a law repealing the compact, provided that if a regional facility is located within such state, such regional facility shall remain available to the region for four years after the date the Commission receives verification in writing from the Governor of such party state of the rescission of the compact.

Compact, Article VII(g) (App. at 24a).

This withdrawal provision does not exempt party states designated as "host states." Nor is a reason required for a state to withdraw. The right to withdraw is, in fact, absolute up to thirty days following the commencement of operation of the second host state disposal facility. Compact, Article VII(h) (App. at 24a). The only requirement is that the state legislature enact a law repealing the Compact.

Furthermore, Article VII(f) only authorizes the Commission to impose sanctions on a "party state." Once the North Carolina General Assembly adopted legislation withdrawing North Carolina from the Compact, North Carolina was no longer a party state and the Commission lost its jurisdiction to impose sanctions.

Plaintiffs rely on Article VII(f) of the Compact agreement for the proposition that the Commission's jurisdiction continued despite North Carolina's withdrawal. This provision states in part:

> Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction.

Compact, Article VII(f) (App. at 23a-24a, 23a). Read in the context of the sanction provision as a whole, this language does not attempt to address Commission jurisdiction over a state that has withdrawn from the Compact. Subsection (f), in fact, contemplates that the most severe sanction authorized would be expulsion from the Compact, which could have no application to a state which had already withdrawn.

Reading Article VII(f) in *pari materia* with Article VII(g) and (h) so as to give effect to each part requires the conclusion that any party state (other than one where a regional facility is located) has the absolute right to withdraw and immediately terminate its rights and obligations under the Compact. When North Carolina withdrew from the Compact in July, 1999, a sanction complaint had been filed by two party states, but no action had been taken by the Commission. The Commission did not initiate the formal sanction hearing procedure until August, 1999 and did not actually impose sanctions until December, 1999. It could not possibly have been contemplated by the states enacting the Compact that, in so doing, each state became indefinitely bound by the Commission's sanctioning power, even after withdrawal from the Compact. North Carolina was not a party state subject to the jurisdiction of the Commission at the time the sanctions were imposed and,

therefore, has no legal obligation to recognize the Commission's demands.

North Carolina has at all times acted in good faith in its efforts to site and license a disposal facility for the Compact. Upon being chosen as the host state for the second regional disposal facility, North Carolina created the Authority to oversee site selection and development of the disposal facility. North Carolina contracted with Chem-Nuclear, an experienced operator of low-level radioactive waste disposal facilities, to develop the North Carolina site. The Authority provided extensive consultant and staff assistance to Chem-Nuclear in the site selection process and in the submittal of a license application to the Department. Additionally, throughout the period from 1986 to 1999 the Authority worked closely with the Commission, through North Carolina's two Compact Commissioners, to ensure the Commission was informed of North Carolina's progress as it attempted to navigate the myriad legal, technical and political roadblocks inherent in the development of a low-level radioactive waste disposal facility. North Carolina did, however, consistently insist that the party states continue to equitably "distribute the costs, benefits, and obligations of successful low-level radioactive waste management." Compact, Article I (App. at 6a).

It is well documented that project delays were attributable to multiple technical, legal and practical problems. Characterization of one of the initial sites identified for study was delayed by legal challenges and unforeseen geological problems. Poor performance by Chem-Nuclear in certain

respects further compounded the difficulty of satisfying the Department's technical experts that public safety and health issues had been fully addressed. Even at the time development activities ceased at the Wake County site in December, 1997, serious concerns for site suitability were still being debated. Throughout, however, documented progress was achieved within the limits of available funding.

In assuming the role of the second host state, North Carolina's primary responsibility to its citizens was to ensure that safety considerations were paramount in licensing any disposal facility to be constructed. The Compact agreement recognized this duty in reserving to each host state the authority to exercise complete control of the siting, licensing, and regulation of any disposal facility to be constructed within its borders. Compact, Article VI(a)(7) and (9) (App. at 20a). North Carolina exercised this authority in a judicious manner throughout the process, consistently progressing but never allowing demands of expediency to jeopardize the safety and health of its citizens. Any contention by plaintiffs that North Carolina either acted or was obligated to act otherwise is rebutted by both law and the facts relevant to this dispute.

## CONCLUSION

The Commission's attempt to invoke the original jurisdiction of this Court to resolve its contract dispute with the State of North Carolina has already been rejected. The Commission's addition of four party states as nominal plaintiffs in an identical action does not constitute a basis for reconsideration of the Court's decision. The Motion should therefore again be denied.

Respectfully submitted,

ROY COOPER
North Carolina Attorney General

Grayson G. Kelley*
Senior Deputy Attorney General

John F. Maddrey
Special Deputy Attorney General

Jennie Wilhelm Mau
Assistant Attorney General

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*Counsel of Record*